No. 82-1832

In the Supreme Court of the United States

OCTOBER TERM, 1984

TOWN OF HALLIE, ET AL., PETITIONERS

v.

CITY OF EAU CLAIRE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the "state action" exemption to the Sherman Anti-Trust Act is unavailable to a municipality that acts in accordance with a state's specific statutory grant of authority to act in an allegedly anticompetitive manner.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Constitution and statutes:

Constitution and statutes—Continued: Page

Miscellaneous:

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INTEREST OF THE UNITED STATES

This case concerns the application to municipalities of the "state action" exemption to the federal antitrust laws, developed by this Court in *Parker* v. *Brown*, 317 U.S. 341 (1943), and subsequent cases. The United States has primary responsibility for enforcement of the antitrust laws. For that reason it has an interest in assuring that the state action doctrine is applied with proper regard for the principles of federalism on which it is based, viz., that conduct properly characterized as action of the state as sovereign is excluded from the coverage of the Sherman Anti-Trust Act (Sherman Act), 15 U.S.C. 1 *et seq.*, but that no other restraints of trade are held immune. Accordingly, the United States has participated in most of the cases in which this Court has considered issues regarding the state action doctrine.

STATEMENT

1. Petitioners are four Wisconsin townships adjacent to respondent, the City of Eau Claire, Wisconsin (City). Petitioners filed suit in the United States District Court for the Western District of Wisconsin against the City under the Sherman Act, 15 U.S.C. 1 *et seq.*, seeking only injunctive relief. They alleged that the City constructed (with federal funds) a sewage treatment facility that is the only such facility available to the surrounding area. They further claimed that they are potential competitors of the City in the collection and transportation of sewage, which are elements of sewage service distinct from sewage treatment. Finally, they assert that the City refused to provide sewage treatment services to sewage collected and transported by petitioners; instead, as the district court explained: "[t]he City has provided such services to individual land owners in the Towns if and only if the owners agree that the City will also provide sewage collection and transportation services by requiring annexation of the owner's land to the City" (J.A. 14). Petitioners alleged that the City was using its monopoly over sewage treatment to gain an unlawful monopoly over sewage collection and transportation. Petitioners also claimed that the City's requirement that consumers use the City's collection services in order to obtain treatment services from it was an unlawful tying arrangement and that the City's conduct amounted to an illegal refusal to deal with them. J.A. 13-23.[1]

The district court dismissed petitioners' complaint (J.A. 13-22). Applying this Court's then-recent decision in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982), the court held that all of petitioners'

[1] Petitioners further alleged that the City's denial of sewage treatment services violated the Federal Water Pollution Control Act (the City used federal funds to construct its sewage treatment facility) and a state common law duty of a utility to provide service on a just and reasonable basis (J.A. 6-7).

Sherman Act claims were barred because the City's alleged conduct was protected state action. The court first found that Wisconsin's statutory scheme regulating municipal provision of sewage service clearly expressed a state policy to allow cities to refuse to provide such services unless the user agreed to become annexed to the city (J.A. 19-20). Thus, the court held that the State had displaced competition as the sole basis for deciding whether and how those services should be provided (*ibid.*). Second, the district court held that the State Department of Natural Resources (DNR) had authority to review municipal decisions concerning both the provision of sewage services and annexation and therefore the State provided adequate supervision of the City's actions as required by *City of Boulder* (J.A. 20).[2]

2. The court of appeals affirmed (J.A. 26-44). The court of appeals recognized that under this Court's decisions, "'the *Parker* [state action] doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service'" (J.A. 31; quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978)). Applying this standard to the allegations of the complaint, the court of appeals held that the allegedly anticompetitive conduct was state action. J.A. 33-40. The court rejected petitioners' argument that the City's refusal to serve them was not state action because the City could not "point to a state policy authorizing the City's use of monopoly power over sewage treatment to gain monopolies in sewage collection and transportation" (J.A. 33-34). Instead, the court

[2] The district court also held that the Federal Water Pollution Control Act does not provide a right to sue, that petitioners failed to pursue administrative remedies and that the Act provides no basis for the specific relief petitioners sought (J.A. 21). Having dismissed the federal claims, the district court dismissed for want of jurisdiction the pendant state law claim (J.A. 21-22).

concluded that "[i]f the state authorizes certain conduct, we can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity" (J.A. 34-35). Thus, if the City showed that "the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services," then "we can assume that the State contemplated that anticompetitive effects might result from conduct pursuant to that authorization" (J.A. 34).[3]

Examining the relevant Wisconsin statutes, the court found that they authorize a municipality to set the geographic limits of its monopoly over sewage service (J.A. 37)[4] and that the State had given the cities "authority • • • to insist on annexation as a condition to extending sewer services to the surrounding area" (J.A. 37).[5] The court concluded that these statutes consti-

[3] Relying on *Lafayette* and *Boulder*, the court of appeals rejected the notion that state compulsion is required to establish municipal immunity; as long as the state policy "evidences an intent of the legislature to displace competition with regulation—whether compelled, directed, authorized, or in the form of a prohibition," it satisfies the articulation requirement (J.A. 35-36).

[4] Wis. Stat. Ann. § 66.069(2)(c) (West Supp. 1983-1984) (emphasis omitted) (applicable to sewage systems under Wis. Stat. Ann. § 66.076(8) (West Supp. 1983-1984)) provides:

> Notwithstanding s. 196.58(5), each village or city • • • may by ordinance fix the limits of [sewage] service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

[6] Wis. Stat. Ann. § 144.07(1m) (West 1974) provides:

> An order by the [state] department [of natural resources] for the connection of unincorporated territory to a city or village system or plant under this section shall not become effective for 30 days following issuance. Within 30 days following issuance of the order, the governing body of a city or village subject to an order under this section may commence an annexation proceeding under s. 66.024 to annex the unincorporated territory subject to the order. If the result of the referendum under S. 66.024(4) is in favor of annexation, the territory shall be annexed to the city or village for all purposes, and sewerage service shall be extended to the territory subject to the order. In an application for an annexation referendum is denied under s. 66.024(2) or the referendum under s. 66.924(4) is against the annexation, the order shall be void. If an annexation proceeding is not commenced within the 30-day period, the order shall become effective.

tuted sufficient "evidence" of a state policy to allow the City to refuse to deal with petitioners and thereby acquire or maintain a monopoly over all facets of sewage service.

The court of appeals also found support for its conclusion that state policy authorizes the city to refuse sewage treatment services to unannexed areas in a decision of the Wisconsin Supreme Court, *Town of Hallie* v. *City of Chippewa Falls*, 105 Wis. 2d 533, 314 N.W.2d 321 (1982). The court of appeals noted that, in addressing a claim that a city's refusal to serve adjoining towns violated state antitrust laws, the Wisconsin Supreme Court had held that the Wisconsin legislature " 'viewed annexation by the city of a surrounding unincorporated area as a reasonable quid pro quo that a city could require before extending sewer services to the area' " (J.A. 39; quoting 105 Wis. 2d at 540-541, 314 N.W.2d at 325).

Having found that the City's conduct "was in a furtherance of clearly articulated and affirmatively expressed state policy" (J.A. 40), the court of appeals rejected petitioners' contention that this Court's decision in *California Retail Liquor Dealers' Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), requires the state actively to supervise the City's conduct in order for it to be immune from the Sherman Act under the state action doctrine. The court of appeals distinguished *Midcal* on the ground that the conduct at issue there was viewed by this Court as " 'essentially a private price-fixing arrangement' "

(J.A. 40, quoting, 445 U.S. at 106). In contrast, since the present case involved "a local government performing a traditional municipal function," the court of appeals held that state "[s]upervision is unnecessary because local governments operate pursuant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority" (J.A. 41).[6] The court also concluded that imposing a supervision requirement on cities would be unsound policy, eroding the concept of local autonomy and home rule authority clearly expressed in the state's statutes. J.A. 42-43.

SUMMARY OF ARGUMENT

A.

1. Petitioners' contention that the City's refusal to provide them with sewage treatment services violated the Sherman Act rests on the erroneous premise that the state action doctrine treats municipalities and private persons in identical fashion. Congress intended the Sherman Act to be a broad prohibition on private restraints of trade; the Sherman Act was not intended to prohibit governmental action by the states as sovereigns that restrains competition, nor was it intended to impair the states' ability to rely on their officers and agents to carry out state policies in a manner that might restrain competition. *Parker* v. *Brown*, 317 U.S. 341 (1943). Accordingly, this Court has held that action of the state as sovereign is absolutely immune from the Sherman Act, *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); action by private parties is protected only if it is compelled by the state, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); but action by municipalities is protected if it is contemplated by the state pursuant to a clearly articulated state policy to displace competition, *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982).

[6] The court of appeals reserved the question whether activity outside the scope of a traditional governmental function must be actively supervised. J.A. 43 n.18.

2. The difference between the standards for municipalities and private persons is not merely semantic; the special standard for municipalities is justified by the special relationship municipal governments have with the state and the importance of cities to the state's exercise of sovereignty. Unlike private parties, municipalities carry out state functions and often act as agents of the state in implementing state policy or providing public services. Although the Court concluded in *City of Lafayette* and *City of Boulder* that Congress did not intend to equate states and cities, whose wide-ranging activities could seriously impair Sherman Act values without carrying out state policy, it did not hold that the cities' role in our federal system of government is no different from that of private persons. When a city acts pursuant to a clearly expressed state policy to displace competition, it performs authorized governmental services on behalf of the state acting as sovereign. The Sherman Act was not intended to prohibit either the state's authorization of such conduct or the city's exercise of discretion in implementing the state's policy. Requiring states to anticipate and set forth detailed directions to the city concerning every potential anticompetitive purpose or effect contemplated by the state would unduly impair traditional state discretion to allocate governmental functions between the state and its instrumentalities, and this Court already has made clear that Congress did not so intend to undermine the state's relationship with its cities, *City of Boulder*; *City of Lafayette*.

3. Immunity for municipalities under the state action doctrine should exist whenever the city's action is contemplated by the state, pursuant to a clearly articulated state policy to displace competition; the state should not be required to supervise the city's activities. This Court has never held that municipalities, in contrast to private persons, must be supervised by the state in order to acquire immunity, *City of Boulder*, 455 U.S. at 51 n.14, and the courts of appeals generally have rejected any

requirement of state supervision for municipalities. See, *e.g.*, *Gold Cross Ambulance & Transfer* v. *City of Kansas City*, 705 F.2d 1005, 1004 (8th Cir. 1983). Requiring a state to supervise its agents is by definition unnecessary to involve state agents in the decision-making and would not enhance any Sherman Act values since the state already must authorize and contemplate the municipality's anticompetitive actions.

B.

Here, the State has clearly articulated a policy to displace competition with respect to municipal provision of sewage services. Wisconsin grants to every municipality authority to set the limits of its sewage service (Wis. Stat. Ann. § 66.069(2)(c) (West Supp. 1983-1984)) and to refuse to provide services outside its limits unless the residents agree to be annexed to the City (Wis. Stat. Ann. § 144.07(1m) (West 1974)). The court of appeals interpreted these statutes as allowing cities to refuse to provide sewage service to areas refusing to be annexed. See *Town of Hallie* v. *City of Chippewa Falls*, 105 Wis. 2d 533, 314 N.W.2d 321 (1982). Under this interpretation, which is reasonable, the antitrust claims in petitioners' complaint are barred because the State has clearly articulated a policy to displace competition and has contemplated the conduct at issue.

Contrary to petitioners' contention, the Wisconsin statutory scheme does not express state "neutrality" toward the anticompetitive actions of the City as that term was used in *City of Boulder*. Unlike Boulder's, Eau Claire's actions were not merely undertaken pursuant to its home rule authority; instead, the state legislature specifically determined that a right to refuse to provide services except on condition of annexation should be delegated to a city in order to encourage broad provision of sewage services. This is not neutrality; it is precisely the type of authorization this Court required in *City of Boulder*.

ARGUMENT

BECAUSE THE CITY'S ALLEGEDLY ANTICOMPETITIVE CONDUCT WAS CONTEMPLATED BY THE STATE AS A MEANS OF IMPLEMENTING A CLEARLY ARTICULATED STATE POLICY, IT IS EXEMPT FROM THE SHERMAN ACT AS STATE ACTION

Both the district court and the court of appeals held that the State of Wisconsin's sewage services statutes constitute a "clearly articulated and affirmatively expressed state policy" and demonstrate that the State contemplated the City's allegedly anticompetitive acts, as required by this Court's decision in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 52 (1982). Petitioners argue (Br. 14-29) that these holdings are incorrect, in effect, because the State did not compel the City to violate the law, or at least the City's acts were not "necessary" to comply with state law. In petitioners' view, compulsion is required in order to convert any "nonsovereign" activity—private or municipal—into protected state action. Petitioners' contention is contrary to this Court's decisions, which have made clear that the availability of immunity under the state action doctrine varies significantly depending on whether the action is that of the state or its instrumentality, or is merely that of a private person.[7]

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[7] The identity of the named defendant is not determinative; the crucial inquiry is whose action is at issue. In *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) and *Hoover* v. *Ronwin*, No. 82-1474 (May 14, 1984), the Court found that the restraint at issue was imposed by the state supreme court although the bar (in *Bates*) and members of a committee of the court (in *Ronwin*) were named as defendants.

A. This Court's Decisions Clearly Establish That The State Action Immunity Doctrine Applies More Broadly To The Acts Of States And Their Instrumentalities Than To The Acts Of Private Persons

1. The antitrust state action doctrine was first recognized by this Court in *Parker* v. *Brown*, 317 U.S. 341 (1943); the Court observed that although the Sherman Act was intended by Congress as a broad prohibition on private restraints of trade, "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351. The Court found no congressional intent in enacting the Sherman Act to prohibit "state action or official action directed by the state" (*ibid.*). See also, *e.g.*, *Hoover* v. *Ronwin*, No. 82-1474 (May 14, 1984), slip op. 14 & n.24. Therefore, it concluded that because the state "as sovereign, imposed the restraint as an act of government" (*Parker*, 317 U.S. at 352) the state program at issue in *Parker* was not invalid under the Sherman Act.

In state action cases since *Parker*, the Court has focused on the fundamental question whether the particular restraint alleged is attributable to the state, and it has distinguished among (i) the ultimate state policy makers, (ii) private parties and (iii) subordinate units of state government. The basic protection for state legislative acts recognized in *Parker* has been extended to state supreme courts, at least where they regulate as the ultimate policy maker of the state.[8] If the allegedly anticompetitive action is attributable to the state itself, the very fact that the state's legislature (or supreme court)

[8] The Court has not determined "whether the Governor of a State stands in the same position as the state legislature and supreme court for purposes of the state action doctrine." *Hoover* v. *Ronwin*, slip op. 9 n.17.

has made the decision is alone sufficient to assure "that federal policy is [not] being unnecessarily and inappropriately subordinated to state policy." *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 362 (1977).[9]

2. In the case of purely private parties, this Court has imposed very strict requirements for attributing their conduct to the state as sovereign. This is because, as the Court emphasized in *Parker*, the Sherman Act was intended broadly "to suppress combinations to restrain competition * * * by individuals and corporations." 317 U.S. at 351. It is only when private parties are compelled by the state to act in an anticompetitive manner that their conduct can qualify for the immunity this Court has recognized for state-imposed restraints of trade.[10] See *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790-791 (1975); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592-593 (1976). However, since private persons are presumed to act in furtherance of their private interests, the state action doctrine does not protect state legislation

[9] In *Bates* v. *State Bar of Arizona*, 433 U.S. at 359-360 (citation omitted); quoting *Goldfarb* v. *Virginia State Bar*, 421 U.S. at 791, the Court held that "the challenged restraint is the affirmative command of the Arizona Supreme Court under its Rules * * *. That court is the ultimate body wielding the State's power over the practice of law, * * * and, thus, the restraint is 'compelled by direction of the State acting as a sovereign.'" Similarly, in *Hoover* v. *Ronwin*, *supra*, the Court held that the conduct at issue—approving a particular grading formula for the bar examination, and deciding how many applicants and which applicants would be admitted—"clearly was [action] of the Arizona Supreme Court." Slip op. 15. Because "the State itself ha[d] chosen to act" (*id.* at 14), the state action doctrine precluded application of the Sherman Act to that conduct. See also *Parker* v. *Brown*, 317 U.S. at 350 ("the legislative command of the state"); *Olsen* v. *Smith*, 195 U.S. 332, 344-345 (1904).

[10] We discuss this issue more fully in our brief in *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, No. 82-1922. A copy of our brief in that case is being served on the parties in this case.

compelling their conduct unless the state also directly supervises the anticompetitive conduct. See *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum Inc.*, 445 U.S. 97, 105 (1980).

3. Contrary to petitioners' repeated assertions (Br. 17-21, 24-29), this Court has never held that cities are subject to the same rigorous standards as private persons for acquiring state action immunity from the Sherman Act. To the contrary, the Court has emphasized that, although a state cannot confer immunity from the Sherman Act on private parties "by authorizing them to violate it, or by declaring that their action is lawful" (*Parker*, 317 U.S. at 351), "'*Parker* and its progeny make clear that a State properly may . . . *direct or authorize* its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws'" (*City of Boulder*, 455 U.S. at 57; quoting *City of Lafayette*, 435 U.S. at 417 (emphasis supplied)). This Court has thus explained that conduct of a municipality or a state agency may fairly be attributed to the state as sovereign if the subordinate unit is exercising power delegated to it in order to allow it to implement a clearly articulated state policy to displace competition with state control. See *City of Lafayette*, 435 U.S. at 410, 413; *City of Boulder*, 455 U.S. at 55. In such circumstances, the subordinate unit of government acts as the state's agent and may properly claim immunity. See *Hybud Equipment Corp.* v. *City of Akron*, No. 83-3306 (6th Cir. Aug. 24, 1984), slip op. 21; *Gold Cross Ambulance & Transfer* v. *City of Kansas City*, 705 F.2d 1005, 1012 n.11 (8th Cir. 1983).

Although the decisions of this Court in cases involving municipalities thus have clearly established standards for immunity allowing states to delegate discretion to municipalities but not to private parties, petitioners rely upon *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), in arguing that the standards for both cities and private persons

are the same. *Midcal* was a suit seeking to enjoin enforcement of a state statute that mandated resale price maintenance by private liquor wholesalers. State compulsion was clearly present in *Midcal* as to the private parties who were required to comply with the statute. It was in that context that the Court stated in *Midcal* that the restraint on competition falls within the state action exemption only if it is "'clearly articulated and affirmatively expressed as state policy' [and] * * * the policy [is] * * * 'actively supervised' by the state itself." *Id.* at 105; quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 398, 410 (1978) (opinion of Brennan, J.). The Court held that the state failed adequately to supervise the anticompetitive prices set by private entities and accordingly rejected the state action defense.

Petitioners attempt to bolster their argument with the following syllogism: In *Goldfarb* and *Cantor* this Court required compulsion for private conduct; *Midcal* involved private conduct; therefore the "clearly articulated policy" must mean "compulsion." We agree that in the context of private conduct, the "clearly articulated policy" and "compulsion" standards tend to meld. This is because, as we explain in our brief in *Southern Motor Carriers*, the *Parker* immunity doctrine must, as an implied exemption from the antitrust laws, be narrowly confined to its purpose of immunizing restraints of trade imposed by the states in the exercise of their governmental powers. Discretionary private conduct, therefore, cannot qualify. But, as we show, the Court has recognized that the states, for whom the immunity has principally been fashioned, do not have unitary governmental systems but, instead, have an important tradition of local self-government. The immunity, correspondingly, accommodates that tradition by extending to acts taken by local governmental units to implement clearly articulated state policies to displace competition, even if those acts are not compelled by the state. In the context of action by state instrumentalities, therefore, the "clearly articulated policy" standard significantly differs from "compulsion."

Accordingly, the Court has repeatedly reaffirmed the significant distinction, drawn in *Parker* itself, between private parties and officers or agents of a state. See, *e.g.*, *Cantor*, 428 U.S. at 601 (opinion of Stevens, J.) ("*Parker* concerned only the legality of the conduct of the state officials."); *Bates*, 433 U.S. at 361 ("*Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party."); *City of Lafayette*, 435 U.S. at 411 n.40 (opinion of Brennan, J.) ("*Cantor's* analysis is not necessarily applicable" to restraints imposed by a "State's subdivisions" because *Cantor* involved "anticompetitive activity in which purely private parties engaged.").[11]

In addition, the Court has noted that although private parties are clearly subject to the treble damages provision in the Sherman Act, perhaps municipalities are not. *City of Lafayette*, 435 U.S. at 401-402; *City of Boulder*, 455 U.S. at 57 n.20. Also, the Court has suggested that perhaps the substantive standards for liability may be different for municipalities. *City of Lafayette*, 435 U.S. at 417 n.48; *City of Boulder*, 455 U.S. at 56-57 n.20.

B. The Standards This Court Has Adopted For Conferring State Action Immunity On Acts Of State Instrumentalities Are Consistent With The Federalism Principles Embodied In The State Action Doctrine

1. The difference in treatment between municipalities and private persons that this Court has recognized is

[11] Similarly, in *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109-110 (1978), the Court held that the discretionary exercise of delegated authority by a subordinate state agency, pursuant to a "clearly articulated and affirmatively expressed" statutory system of regulation, is not subject to the Sherman Act. But the Court expressly distinguished such action by the state's agents from private restraints authorized by the state, such as that held to violate the Sherman Act in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951).

fully justified by the very different relationship between cities and states compared to private persons and states. It is true that cities are not themselves "the State as sovereign," and accordingly "for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign." *City of Lafayette*, 435 U.S. at 410 (opinion of Brennan, J.); *City of Boulder*, 455 U.S. at 53-54. Cf. *Hans* v. *Louisiana*, 134 U.S. 1, 13, 16-17 (1890). But municipalities are created by the states in order to assist them in providing public services.[12]

Contrary to petitioners' contention (Br. 25), this Court's decision in *City of Boulder* did not declare that cities stand in the same shoes as private persons. Nor do they. What *City of Boulder* recognized was that the sheer number of municipalities and other state instrumentalities that may engage in anticompetitive activities creates a significantly greater risk to the Sherman Act's pro-competitive values than that created by granting immunity to the states. This is particularly so where the city engages in proprietary activities. See *City of Lafayette*, 435 U.S. at 424-425 (Burger, C.J., concurring). Hence, the Court in *City of Boulder* held that Congress could not be presumed to have intended to allow state instrumentalities to act anticompetitively in pursuit of their own, rather than the state's policies.

But the Court in *City of Boulder* expressly adopted the "clearly articulated state policy to displace competition" standard to balance the need to protect Sherman Act values while still preserving state flexibility to rely on their instrumentalities to implement state policy. Conduct of a municipality or a state agency may fairly be attributed to the state as a sovereign if the subordinate

[12] Similarly, unlike private parties, subordinate units of state government engage in "state action" as that term is used in other legal contexts, for example in applying the Fourteenth Amendment, and are for various legal purposes the agents of the state. See generally *National League of Cities* v. *Usery*, 426 U.S. 833, 846-848 (1976).

unit is exercising power delegated to it in order to allow it to implement a clearly articulated state policy to displace competition with state control. *City of Lafayette*, 435 U.S. at 410, 413; *City of Boulder*, 455 U.S. at 55. In such circumstances, the subordinate unit of government acts as the state's agent and therefore, in light of the Court's holding in *Parker* that Congress intended to preserve the states' governmental prerogatives, it is reasonable to infer that Congress did not intend to prohibit the municipality's efforts to perform governmental functions that are directed by the states.

Such a rule is crucial if states are to be able to provide services in a reasonably efficient manner. When a state decides to displace competition with a system of regulation designed to protect the public welfare, the legislature often, for practical reasons, must delegate power to subordinate agencies to carry out the state's policy. In order to assure that essential services are delivered to the residents of a state, such as sewage treatment, states are often obliged, or may properly prefer, to delegate to municipalities the primary responsibility for providing that service. Unlike private parties, municipalities that exercise such delegated authority are accountable to the ultimate state policy makers and to an electorate. Also, unlike private parties, cities have an obligation to act in the public interest.

In order to provide cities with enough financial incentive to undertake to provide certain governmental services, the state may also conclude that it is necessary to grant the municipality a measure of monopoly power with respect to the provision of those services. In so doing the state is exercising precisely the type of governmental authority that this Court held in *Parker* v. *Brown*, *supra*, that Congress intended to immunize from the Sherman Act. We see no basis for holding that the state's grant of authority to restrain competition in providing a discrete service is protected, but that the municipality's action, which is itself a form of governmental action, taken pursuant to the grant of authority is not. Cf. *Dalehite* v. *United States*, 346 U.S. 15, 36 (1953).

It certainly does not serve any interest in efficient state government to subject the state's governmental agent to potential federal antitrust liability for doing the state's bidding. And effective implementation of state policy often requires the states to give subordinate governmental units discretion in implementing state policies that have been expressed in relatively general terms or that depend on the implementing body's expert analyses of particular circumstances.[13] *City of Lafayette*, 435 U.S. at 413; *City of Boulder*, 455 U.S. at 51. Thus, subjecting discretionary state agency conduct contemplated by the state to the kind of scrutiny proposed by petitioners would seriously interfere with the state's ability to " 'allocate governmental power between itself and its political subdivisions' " (*City of Boulder*, 455 U.S. at 57; quoting *City of Lafayette*, 435 U.S. at 416) and thereby greatly encumber or totally frustrate implementation of state policy.

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[13] If the discretionary conduct of state instrumentalities were judged by ordinary Sherman Act standards, public interest factors would not be admissible to justify restraints on competition. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978). This would effectively preclude the legislature from delegating to a subordinate unit functions requiring the exercise of discretion where, in the legislature's judgment, the public interest requires some deviation from the competitive market process. The Court in *City of Boulder* did not decide whether the *Professional Engineers* test would be applied to municipalities. See *Boulder*, 455 U.S. at 56 n.20; *id.* at 65-67 (Rehnquist, J., dissenting). On the other hand, expanding substantive antitrust analysis to allow courts to consider factors other than the competitive effects of a restraint imposed by a state agency acting in accordance with an articulated state policy would require an analysis bearing little resemblance to the substantive Sherman Act standards developed by this Court and lower courts over the years.

2. We recognize that there is some risk that a municipality or other state agency acting under a very broad grant of authority may, unlike the state legislature, respond only to a narrow segment of the public. *City of Lafayette*, 435 U.S. at 414; *City of Boulder*.[14] But *City of Boulder*'s requirement of a clearly articulated state policy to displace competition and replace it with authorized municipal action adequately confines that risk. We do not believe that it is necessary, as petitioners argue (Br. 14-17), to require the state to compel the city's action in order for it to be immune from the Sherman Act, or that the City's action be "necessary" to accomplish the state's purpose. If the authority granted by the statute indicates that the legislature contemplated the type of anticompetitive conduct at issue, then it can be presumed that the legislature has considered the reasonably foreseeable consequences of the conduct and has determined that such an exercise of the agency's discretion will further the interests of the state as a whole. Certainly it would be inappropriate for federal courts in the context of antitrust litigation to examine the city's action any more intrusively; "[c]ourts * * * are ill equipped to determine in many cases whether a restraint was necessary." *Hybud Equipment Corp.* v. *City of Akron*, slip op. 20. Thus, subordinate agency action within the range contemplated by the legislature—even if it is not the only possible agency action—is properly deemed to be protected state action for Sherman Act purposes.

3. Petitioners argue (Br. 20) that even if a state does delegate power to a state instrumentality to take particular actions, such as refusing to deal with competitors who do not submit to annexation, this authority

[14] This risk is significantly increased where a state agency is composed of members of a profession regulated by that agency and thus has an incentive to "foster anticompetitive practices for the benefit of its members." *Goldfarb* v. *Virginia State Bar*, 421 U.S. at 791.

does not evidence a clearly articulated state policy to displace all possible competition. In effect, they argue that state action immunity is available only if the state specifically expresses an intent to accomplish, or at least specifically refers to, the particular anticompetitive purpose or effect alleged in the antitrust complaint. Thus, in their view, the failure of the Wisconsin legislature to state expressly that the cities may employ the inherently anticompetitive power they received from the state to monopolize sewage collection and transportation service or to engage in arguably anticompetitive refusals to deal or tie-ins is fatal to the City's claim of immunity.

This argument defies common sense; no state legislature passes laws that detail all of the anticipated effects of the legislation. In interpreting state law, it is appropriate to assume that "a restraint which is expressly set forth in a legislative scheme for regulation is one that reflects a state policy to displace competition." *Hybud Equipment Corp.* v. *City of Akron*, slip op. 19. Refusing to recognize such a state policy would simply interfere with the state's ability to allocate responsibility between itself and its instrumentalities with no corresponding gain in Sherman Act values. See page 17, *supra*.

Indeed, this Court has specifically rejected attempts similar to petitioners' to confine unduly the state's authority to use its instrumentalities to serve the state's regulatory ends. In *City of Lafayette*, the Court disclaimed any intent to require states not only to authorize a subordinate agency's course of conduct, but also to anticipate and set forth in detail its policy concerning every potential anticompetitive purpose or effect that might be charged to an agency exercising the powers delegated to it. As the plurality opinion there stated, the state instrumentality need not necessarily be able to point to "specific, detailed" authorization; "an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to oper-

ate in a particular area, that the legislature contemplated the kind of action complained of.'" *City of Lafayette*, 435 U.S. at 415 (citation omitted).[15]

4. Finally, petitioners contend (Pet. Br. 38-42) that if the "clearly articulated state policy to displace competition" test is satisfied, even though the state does not compel the municipalities to take any particular action, then an additional requirement of state supervision of such instrumentalities should be imposed. In *City of Boulder*, this Court expressly reserved the question whether municipal action pursuant to clearly articulated and affirmatively expressed state policy also must satisfy the "active state supervision" test that the Court in *Midcal* applied to a private restraint compelled by the state. 445 U.S. at 51 n.14. We submit that the court of appeals was correct in refusing to impose a supervision requirement on traditional municipal conduct.[16]

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[15] Unlike a more precise grant of authority, a very general grant of authority, such as the home rule provision in *City of Boulder*, provides no basis for an inference that the state contemplated the restraint at issue and, thus, that in imposing it the subordinate agency is acting as the state's agent. It is not sufficient, therefore, that the state has given a subordinate agency general legislative authority (*City of Boulder*) or regulatory authority to implement a broad public interest standard (*ibid.*), or that it has articulated a policy to displace competition in some other area of an industry's activities (*Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976)). Such sovereign "neutrality" concerning regulation of particular matters does not allow the subordinate unit's action to be attributed to the state.

[16] The lower courts generally have declined to require active state supervision of the activities of municipalities and state agencies. See, *e.g.*, *Gold Cross Ambulance & Transfer* v. *City of Kansas City*, 705 F.2d at 1014; *Gambrel* v. *Kentucky Bd. of Dentistry*, 689 F.2d 612, 620 (6th Cir. 1982), cert. denied, No. 82-1067 (Feb. 22, 1983); *Euster* v. *Eagle Downs Racing Ass'n*, 677 F.2d 992, 995-996 (3d Cir. 1982), cert. denied, No. 82-501 (Nov. 15, 1982); *Benson* v. *Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 275 (9th Cir. 1982); *Hybud Equipment Corp.* v. *City of Akron*, *supra*; but see *Corey* v. *Look*, 641 F.2d 32, 36-37 (1st Cir. 1981).

State supervision of private conduct compelled by the state is necessary to insure that such conduct furthers state policy rather than remaining "essentially a private [restraint]." *Midcal*, 445 U.S. at 106. The Court in *Midcal* suggested that state supervision might have taken the form of "establish[ing] prices [or] review[ing] the reasonableness of price schedules; [or] regulat[ing] the terms of fair trade contracts * * * [or] monitor[ing] market conditions or engag[ing] in any pointed reexamination of the program." *Id.* at 105-106. Since the State took none of these steps—either directly or through subordinate regulatory agencies—it could not immunize private price-fixing from the Sherman Act even by compelling it.

Where the restraint at issue has been imposed by the action of a municipality or subordinate state agency, however, it is difficult to see how, as a practical matter, the state itself could supervise that restraint (other than through general legislative oversight or judicial review).[17] The very examples given by the Court in *Midcal* show that the supervision requirement for private restraints can be satisfied by involvement of a subordinate state agency— which by definition already exists in the present category of cases, in the imposition of the restraint itself. Nor, contrary to petitioners' contention (Br. 40), is state supervision of the City's conduct necessary to insure that the state as sovereign has made a decision to displace competition.[18] Once it is determined that the

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[17] In *Bates* and *Ronwin*, the Court found the state supreme court's supervision and ultimate control of actions of a particular type of state agency—a committee formed to assist the court in regulating the bar—sufficient to make the conduct at issue that of the state itself. But if the power to delegate authority is to have any meaning, a legislature cannot so extensively supervise and control all subordinate state agencies.

[18] By contrast, there may be a need for "active supervision" where the subordinate state instrumentality is composed—as were

City's actions were expressly authorized and clearly contemplated by the state and thus reflected a prior decision of the state to displace competition, no subsequent review by the state is necessary to warrant attributing them to the state. See *City of Boulder*, 455 U.S. at 71 n.6 (Rehnquist, J., dissenting).[19]

C. The Courts Below Correctly Held That The City's Allegedly Anticompetitive Refusal To Provide Sewage Treatment Service To Areas Beyond Its Boundaries Unless The Residents Agreed To Annexation Was Contemplated By The State Of Wisconsin

1. Because the City is a subordinate state instrumentality, it is entitled, under the analysis suggested above, to state action immunity for conduct that is undertaken pursuant to a clearly articulated state policy to displace competition and substitute governmental control (see pages 12-14, *supra*). Although we do not profess to any particular expertise with respect to Wisconsin sewage

the committees in *Bates* and *Ronwin*—of members of the regulated business.

Although we do not believe that state supervision should be a necessary condition of the state action immunity in this case, we note that the district court found that there was adequate supervision available in the state scheme (see page 3, *supra*). If the Court were to hold that some supervision is necessary, that should not necessitate inquiring precisely into how that scheme operates and attempting to judge its efficacy. See *Hybud Equipment Corp.* v. *City of Akron*, slip op. 27-28.

[19] Petitioners assert (Br. 25 n.15) that the Court's distinction between the states' agents and private persons is illogical because the effects of a municipal utility's anticompetitive conduct are not different from the effects of the same conduct by a private utility. This argument, however, ignores the basic premise of the state action doctrine: It is the source of the restraint on competition—and not its extent or effect—that determines whether the Sherman Act applies. The dual principles of federalism on which the state action doctrine is based require both (i) supremacy of the federal antitrust laws as applied to privately imposed restraints and (ii) latitude for the agents of the state to implement state governmental authority.

law, we submit that the courts below appear properly to have scrutinized the relevant statutes in finding that the anticompetitive conduct alleged in petitioners' complaint was specifically authorized and thus clearly contemplated by the State and, therefore, the complaint was properly dismissed.

Petitioners' complaint alleged that the City's refusal to provide sewage treatment services to petitioners, unless they would consent to annexation by the City, violated the Sherman Act. The Wisconsin legislature, however, clearly and expressly gave its municipalities, including the City, the authority to fix the limits of the areas within which they will provide sewage service and explicitly stated that they shall have no obligation to serve outside those areas. Wis. Stat. Ann. § 66.069(2)(c) (West Supp. 1983-1984) (see note 4, *supra*). Moreover, the state statutes indicate that the legislature took into account the possibility that state residents outside a municipality's boundaries would need service that only the municipality could furnish, and the legislature provided a set of governmental controls for dealing with that situation. The State Department of Natural Resources (DNR), after notice and hearing, may order a municipality to provide service outside its boundaries. Wis. Stat. Ann. § 144.07(1) (West 1974). A city, however, need not comply with an order by the DNR to provide service, unless the residents of the area to be served consent to annexation by the municipality. Wis. Stat. Ann. § 144.07(1m) (West 1974) (see note 5, *supra*).

In other words, the State of Wisconsin has articulated a policy of having governmental authority, rather than market forces, determine which governmental units will provide sewage service to particular areas within the State. It is obviously not practical, however, for the legislature itself to make the decisions as to exactly what areas each local sewage system should serve, and so the legislature has delegated that duty to the municipalities and the DNR. Moreover, the state statutes indicate that

the legislature contemplated that municipalities would be entitled to insist on annexation as a condition to provision of sewage service and that the legislature considered inclusion of an area in the general purpose governmental unit providing sewage service—*i.e.*, annexation into the city—an appropriate condition for a city to impose when it is requested to furnish that traditional municipal service.[20]

Therefore, as the courts below correctly held, in refusing to serve areas outside its boundaries, the City was acting in a manner contemplated by the State. Its action was in accordance with the State's policy determination that the interest of a municipality in requiring annexation of areas seeking the benefits of its sewage facilities outweighs the importance of increasing competition among potential vendors of municipal services by allowing areas outside a municipality to purchase particular services from a city without being annexed. Because the City was acting as an agent of the State in carrying out state policy, the actions at issue were state action and not subject to the Sherman Act.

Petitioners try to salvage at least some of their complaint by alleging that, even if the State contemplated some of the anticompetitive conduct of the City, the State did not necessarily approve all of its anticompeti-

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[20] As the court of appeals noted (J.A. 39, quoting 105 Wis. 2d at 542, 314 N.W.2d at 326), the Wisconsin Supreme Court has concluded that allowing a city to insist on annexation of areas seeking its services

> seems reasonable because establishing and maintaining sewage treatment facilities can be a very substantial financial burden upon the city taxpayers and residents. If an area is to have the benefit of such services, it may be appropriate for it to be annexed in order to add to the city's tax base and help pay for the cost of providing such services.

This holding is consistent with general principles of municipal law. See 2 E. McQuillan, *The Law of Municipal Corporations* § 7.18a at 342 (3d rev. ed. 1979) ("it is customarily appropriate to annex territory for the extension of * * * sewers").

tive effects. But we find it difficult to avoid the conclusion that the State must have foreseen and approved the anticompetitive effects petitioners cite; otherwise the State's apparent policy to encourage the cities to provide sewage service more broadly would not work. If the City were required to allow petitioners to treat the sewage they collect from the towns and transport it to the treatment plant, then the unincorporated areas served by petitioners would have no incentive to be annexed into the City. Thus, if petitioners are granted the injunction they seek, the State's reconciliation of the possible conflicts between cities and unincorporated areas over the provision and financing of sewage services would be frustrated. This seems to us precisely the kind of intrusion into the state's effort to govern that the state action doctrine was designed to avoid.

2. Petitioners' argument (Br. 29-30) that the State is "neutral" within the meaning of *City of Boulder* with respect to the conduct at issue fails to distinguish between what the Court in *City of Boulder* characterized as state "neutrality"—the absence of any indication that the legislature contemplated the conduct at issue in that case—and the specificity with which the State of Wisconsin has delegated to its cities the particular authority exercised by the City in this case.

In *City of Boulder*, the conduct at issue was a city-imposed limitation on the expansion of petitioner's cable television business. The only authority relied on by Boulder to support its contention that its action was "in furtherance or implementation of clearly articulated and affirmatively expressed state policy" (455 U.S. at 52) was Colorado's Home Rule Amendment, which granted to home rule cities such as Boulder "the full right of self government in both local and municipal matters." Colo. Const. Art. XX, § 6; see *City of Boulder*, 455 U.S. at 43 & n.1. Applying the "clearly articulated and affirmatively expressed" state policy standard of *City of Lafayette* and *Midcal*, the Court concluded that where the state, through a broad grant of authority, "allows its municipalities to

do as they please," the state "can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." 455 U.S. at 55. The Court rejected as inconsistent with the federalism principles underlying *City of Lafayette*; *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. at 108-109, and *Midcal* the proposition "that [this] general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances." 455 U.S. at 56. "Nor," the Court added, "can those actions be truly described as 'comprehended within the powers *granted*,' since the term, 'granted,' necessarily implies an affirmative addressing of the subject by the State." 455 U.S. at 55 (citation omitted).

The State of Wisconsin, on the other hand, has not simply "allow[ed] its municipalities to do as they please" by conferring general home rule authority on cities. It has granted the City home rule authority; but in addition, it has "affirmative[ly] addres[sed]" the very conduct at issue in this case—the City's refusal to provide sewage service beyond its boundaries. The State has specifically authorized cities to determine the limits of their sewage service, and it has expressed its policy that a city not be required to extend this traditional municipal service to areas that do not consent to annexation. Moreover, the state has provided for "interaction of state and local regulation" (*City of Boulder*, 455 U.S. at 55) through orders of the state department of natural resources and the annexation process.[21]

In spite of the specificity of the State's conferral on municipalities of the right to require annexation as a

[21] Petitioners ask (Br. 30-33) this Court to review de novo the holdings of the courts below that the statutory scheme constituted a clearly expressed intention to allow the conduct at issue. We have no reason to doubt that the district court and court of appeals correctly interpreted Wisconsin law; ordinarily this Court will not disturb the lower courts' construction of state law unless it appears to be clearly wrong. See *Cort* v. *Ash*, 422 U.S. 66, 73 n.6 (1975); *Ragan* v. *Merchants Transfer Co.*, 337 U.S. 530, 534 (1949).

prerequisite to the provision of sewage services, petitioners argue that the State failed to articulate a policy to allow such refusals for the City's particular anticompetitive purposes. But since the action at issue was clearly authorized by the State, the court of appeals was correct in concluding that the legislature must have contemplated the anticompetitive effects that were plainly foreseeable in light of the power the State granted the City.[22]

[22] Congress currently is considering legislation that would prohibit recovery of antitrust damages against local governments and local government officials for their official conduct. (The legislation also would provide antitrust damage immunity for private conduct expressly required by a local government.) H.R. 6027, 98th Cong., 2d Sess. (1984) (see H.R. Rep. 98-965, 98th Cong., 2d Sess. (1984)) was passed by the House on August 8, 1984, and is now before the Senate. An amendment based on similar, but not identical, provisions of S. 1578, 98th Cong., 2d Sess. (1984) (see S. Rep. 98-593, 98th Cong., 2d Sess. (1984)) was passed by the Senate as part of an appropriations bill (H.R. 5712, 98th Cong., 2d Sess. (1984)), but the amendment was deleted from the bill in conference. Neither H.R. 6027 nor S. 1578, as reported, would alter the application of the antitrust laws to municipalities in actions for injunctive relief; the *Lafayette-Boulder* standards would continue to apply in such actions. See S. Rep. 98-593, *supra*, at 5; H.R. Rep. 98-965, *supra*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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